IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1977

NO. 77-333

JAMES W. WELLHAM, an individual, CHANNING-HAMILTON CORPORATION, a corporation,

Petitioners,

v.

UNION BANK, a banking corporation, CITIZENS AND SOUTHERN NATIONAL BANK, a banking corporation, SECURITY PACIFIC NATIONAL BANK, a banking association, CROCKER NATIONAL BANK, a banking association, BANK OF AMERICA, NATIONAL TRUST AND SAVINGS ASSOCIATION, a banking association, CENTURY BANK, a banking association, EUGENE HARTER, an individual, MARC WEISMAN, an individual, STEVEN FRIED, an individual, RICHARD DOMINGUEZ, an individual, DOES I through X, inclusive,

Respondents.

(CITIZENS AND SOUTHERN NATIONAL BANK, real party in interest)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS OF THE STATE OF CALIFORNIA, NINTH CIRCUIT

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Attorneys for Petitioners

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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioners, JAMES W. WELLHAM and CHANNING-HAMILTON CORPORATION, respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on May 3, 1977.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit denying Plaintiff's petition for rehearing is unreported and is set forth in the Appendix, infra, at p. 1a. The opinion of the United States Court of Appeals for the Ninth Circuit denying Plaintiff's appeal from the United States District Court for the Central District of California is unreported, and is set forth in the Appendix, infra, at p. 1a. The opinion of the United States District Court for the Central District of California is unreported, and is set forth in the Appendix, infra, at p. 2a.

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was entered on May 3, 1977. The timely petition for rehearing was denied on June 3, 1977. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. WHETHER A UNITED STATES DISTRICT COURT ORDER GRANTING

A CHANGE OF VENUE MAY BE REVIEWED BY APPEAL.

2. WHETHER THE VENUE PROVISIONS OF THE CLAYTON ACT, 15 U.S.C. §22, TAKE PRECEDENCE OVER AND SUPERSEDE THE VENUE PROVISIONS OF THE NATIONAL BANKING ACT, 12 U.S.C. §94, THEREBY ENABLING ANTITRUST ACTIONS TO BE BROUGHT AGAINST A NATIONAL BANKING ASSOCIATION IN THE FEDERAL JUDICIAL DISTRICT WHERE THE UNLAWFUL ACT OCCURRED.

STATUTES INVOLVED

28 U.S.C. §1291: Final Decisions of District Courts

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

12 U.S.C. §94: Venue of Actions

> Suits, actions and proceedings against any association under this title [National Banks] may be had in any district, or Territorial court of the United

States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases.

15 U.S.C. §15: Suits by Persons Injured; Recovery of Treble Damages

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. §22: District in which to Sue Corporation

Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

STATEMENT OF THE CASE

This action was commenced on February 24, 1976, by the Plaintiffs against six banking associations and four named individuals who have been charged with conspiracy to boycott and restrain trade, defamation, interference with contractual relationships, and inducing the breach of contractual relationships. All of the wrongful acts were alleged to have taken place in the Central District of California. Citizens and Southern National Bank, one of the Defendants herein, timely motioned to have the action, insofar as it pertains to Citizens and Southern National Bank, transferred to the United States District Court for the Southern District of Georgia, its home district, by virtue of the venue provisions of the National Banking Act, 12 U.S.C. §94. By agreement with the Plaintiffs, Defendant Crocker National Bank has not yet answered the complaint, pending the final determination of the issue of appropriate venue in this litigation. If the venue provisions of the National Banking Act are found to take precedence over and supersede the venue provisions of the Clayton Act, 15 U.S.C. §22, Crocker National Bank will make a motion to have venue transferred to the United States District Court for the Northern District of California, its home district.

Plaintiffs vigorously opposed the motion of Citizens and Southern National Bank to transfer the action, and on July 14, 1976, the United States District Judge ordered the action, insofar as it pertains to Citizens

and Southern National Bank, transferred to the United States District Court for the Southern District of Georgia.

Plaintiffs filed a petition for writ of mandamus in the United States Court of Appeals for the Ninth Circuit on July 19, 1976, seeking an order staying the transfer of the action and denying the motion of Citizens and Southern National Bank. Upon due consideration, the petition was denied on August 9, 1976. Thereafter, on January 6, 1977, Plaintiffs filed an appeal in the United States Court of Appeals for the Ninth Circuit alleging that the District Court order granting the change of venue was an appropriate order to be reviewable on appeal, and that the venue provisions of the Clayton Act take precedence over and supersede the venue provisions of the National Banking Act in an antitrust action brought against a national bank. Citizens and Southern National Bank filed a timely motion to dismiss the appeal for lack of appellate jurisdiction, and Plaintiffs filed a response to said motion to dismiss. On May 3, 1977, the United States Court of Appeals for the Ninth Circuit entered its order dismissing Plaintiff's appeal. A timely petition for rehearing was filed and denied.

REASONS FOR GRANTING THE WRIT

Antitrust actions enjoy a position of great importance in the free enterprise system, and a Plaintiff's choice of venue is often crucial to the outcome of the matter. "Unless the balance is strongly in favor of

the defendant, the plaintiff's choice of forum should rarely be disturbed." Crawford Transport Co. v. Chrysler Corp., 191 F.Supp. 223, 228 (E.D. Ky. 1961); Hills, Antitrust Advisor, §12.51, p. 600 (1971).

"The purpose of the antitrust venue statute is to permit a Plaintiff to seek damages on his home ground." Hills, Antitrust Advisor, §13.20, p. 659 (1971). The purpose of the Clayton Act §12 (15 U.S.C. §22), is to permit the injured person to sue in his own district rather than in a distant district in which a foreign corporation resides or can be found. "In framing §12 to include those districts at the plaintiff's election, Congress thus had in mind not only their convenience, but also the defendant company's inconvenience." United States v. National City Lines, Inc., 334 U.S. 573, 588 (1948).

The denial of Plaintiff's choice of venue is a final order within 28 U.S.C. §1291 since the Plaintiffs will lose finally and irreparably the right to have the venue question litigated at the only time it has any legal significance to the parties. Litigation of the venue question at a later stage of the proceeding will render the issue moot. In the language used by this Court in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949):

> "This decision appears to fall in that small class which finally determine claims of right separable from, and collateral

to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."

A. A UNITED STATES DISTRICT COURT ORDER GRANTING A CHANGE OF VENUE IS A FINAL ORDER.

The problem in this case is whether the circumstances presented establish an exception to the general rule that a court order transferring jurisdiction of an action is an interlocutory order, and therefore nonappealable under 28 U.S.C. §1291.

An exception to the general rule was recognized by this Court in 1948 in Cohen v. Beneficial Industrial Loan Corp., supra where significant inroads on the historic federal policy governing interlocutory appeals were made. The Court, per Justice Jackson, considered the appealability of a District Court order denying Defendant's motion to compel the Plaintiffs to comply with a state regulation concerning security for costs in a stockholder's derivative suit, and held at 337 U.S. 546, that

"Nor does the statute [28 U.S.C §1291] permit appeals, even from fully consumated decisions, where they are but steps towards final

judgment in which they will merge. . . But this order of the District Court did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. When that time comes, it will be too late effectively to review the present order, and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably. . . This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied. . ."

The Court recognized that appellate review of a collateral matter at a later date would be an empty right, and thus 28 U.S.C. §1291 should be construed so as not to deny effective review of a claim fairly severable from the context of a larger litigation process.

The effect of denying review will result in a trial of a conspiracy to boycott trade in three different jurisdictions on opposite ends of the continent. Crocker National Bank, one of the ten Defendants named herein, is also a National Banking Association which, if it can avail itself of the venue provisions of the National Banking Act, can have itself severed from all other Defendants and the

case against it transferred for trial to the Northern District of California. As a consequence, Plaintiffs will be compelled to prosecute their causes of action against the Defendant Citizen and Southern National Bank in the United States District Court for the Southern District of Georgia, against Defendant Crocker National Bank in the United States District Court for the Northern District of California, and against all other defendants in the United States District Court for the Central District of California.

As a result Plaintiffs will undoubtedly be compelled to prosecute their causes of action against the ten Defendants in three different United States District Courts, all of said prosecution occurring before Plaintiff's rights to challenge the validity of any venue transfer order accrues to them.

B. THE DECISION OF THE COURT OF APPEALS DENYING APPEAL IS INCONSISTENT WITH DECISIONS OF THIS COURT.

In addition to being contrary to the congressional intent behind 28 U.S. §1291, the decision adopted by the Ninth Circuit Court of Appeals in this case is inconsistent with its previous decision in Pacific Car and Foundry Co. v. Pence, 403 F.2d 949 (1968), and this Courts decision in Mercantile National Bank v. Langdeau, 371 U.S. 555 (1963) and Swift & Co. Packers v. Compania Colombiana del Caribe, S.A., 339 U.S. 684 (1950).

// //

This Court demonstrated its commitment to giving 28 U.S.C. §1291 a liberal interpretation by permitting the appeal of an order changing venue in Mercantile National Bank. The order issued there was quite similar to the order issue by the District Court in this case, and the Court held that, based upon the ruling in Cohen, an order changing venue was appealable because it was a separate and independent matter and not enmeshed in the factual and legal issues surrounding the cause of action of Plaintiff. This is, of course, the same reasoning that the Ninth Circuit should have followed, but failed to. The result is that the policy of finality expressed in 28 U.S.C. §1291 is frustrated because the Petitioner here will be subjected to long and complex litigation in distant forums which all may be for naught if consideration of the preliminary question of jurisdiction is postponed until the conclusion of the proceedings at trial.

The rule of Cohen was extended in Swift & Co. Packers, when Justice Frankfurter held that an order vacating attachment was reviewable on appeal, although the litigation had not run its entire course, because the right asserted was too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. Anything short of hearing the issue at that time would have been theoretically possible but an empty right. Moreover, "the provision for appeals only from final decisions in 28 U.S.C. §1291 should not be construed so as to deny effective review of a claim fairly severable from the context of a larger litigious process". 339 U.S., at 689.

In Pacific Car and Foundry Co. v. Pence, 403 F.2d 949 (1968) the Ninth Circuit recognized the hopeless position a Plaintiff would be in if a court issues an order changing venue and an appellate court would not review the order until after a trial on the merits. Acknowledging the venue provisions deal with rights too important to be denied review, and that they cannot be effectively remedied on appeal from a final judgment, the Court considered the merits of the transfer order. It stated that

> "The purpose of the rule (28 U.S.C. §1291) is to avoid the disruption, expense, and inconvenience parties and witnesses must suffer by having a trial in an improper forum. To require litigants to await final judgment for relief serves to defeat the very purpose of the venue rule by requiring them to submit to the disadvantages from which the rule is designed to relieve them." 403 F.2d at 952.

These decisions represent this Court's, and the Ninth Circuit's, efforts to effect the intent of Congress to permit review of orders which cannot be effectively remedied on appeal from a final judgment and which pertain to collateral and separable matters from the main action. The failure to follow these decisions jeopardizes the foundation upon which those decisions rest and upon which future case must be decided.

C. THE DECISION OF THE COURT OF APPEALS IS CONTRARY TO THE CONGRESSIONAL PURPOSES UNDERLYING THE NATIONAL BANKING ACT.

The National Banking Act was originally passed in 1864 and was amended in 1873. At that time, communications between localities were laborious and slow, mechanical and photographic means of copying documents were not yet in existence, banks were much smaller business entities than today, and litigation against a bank in any district other than its own district could prove burdensome and expensive to the bank.

> "In 1914 a 'great majority of [commercial-banking corporations] had only a single office, most of the branch banks that did exist operated only a few offices, and none was more than statewide in scope'. In 1900, of the some 8,700 banks in the United States, only 87 had more than a single office; even in 1920, only 530 of the 30,000 odd banks in the United States had branches." Chandler, The Economics of Money and Banking 151, 156 (4th ed. 1964), quoted in Note, An Assault On The Venue Sanctuary Of National Banks, 34 Geo. Wash. L. Rev. 765, 769 N. 34 (1966).

Originally the purpose of the National Banking Act was to create a sound currency system. The Civil War created a sudden emergency need for enormous funds to finance the Union troops, and since state banks were not equiped to meet this need, a strong, uniform federal system was needed. The pressure of the War made the stability of these new national banks a matter of national security.

The circumstances surrounding the venue provisions of the National Banking Act were intended by Congress to meet a specific and temporary need. Today, rapid communications, wide availability of copying devices, and large corporate multi-branch banks create a far different scenario than that which existed in 1864. Instead, today, litigation against a national bank, especially anti-trust litigation, only in the home district of a bank proves burdensome and expensive to a Plaintiff who is not a resident of the same district, both because of the distance between the forum district and the home district, and the prejudice of local citizens for the local bank and against the non-local Plaintiff. See, e.g., Staley v. Homeland, Inc., 368 F.Supp. 1344 (E.D. N.C. 1974).

Congress was well aware that branch banking was not an established practice and that banks did very little, if any, general business outside their counties where originally chartered. 75 Cong. Rec. 9890, 9893 (1932) (remarks of Senator Glass), 76 Cong. Rec. 2090 (1933) (remarks of Senator Fletcher) 76 Cong. Rec. 2206 (1933)

(remarks of Senator Vandenburg). It was therefore not unreasonable to limit suits against national banks to the place where they conducted all their business.

National banks were not even permitted to establish branch banks within their charter location until the passage of The McFadden Act of 1927, 44 Stat. 1228, as amended, 12 U.S.C. §36 (1964), thereby creating a need for a redefinition of "location" in 12 U.S.C. §94. This redefinition has never materialized.

Congress never envisioned national banks as conducting business in more than one location, that is, as being "established" in more places than its charter location, until the congressional amendment in 1933 of section 7, which allowed national banks to establish branches beyond their charter location. The Courts have similarly not grasped the opportunity to interpret the history and meaning of 12 U.S.C. §94 to meet todays necessary, and inescapable conclusion, that the special venue provisions of the National Banking Act no longer serve their intended purpose. Instead, the Courts have relied on hoary decisions based upon an outmoded interpretation of the purposes of the act. The leading federal court case of Leonardi v. Chase National Bank, 81 F.2d 19 (2d Cir. 1936) cited the 1871 case of Manufacturers National Bank v. Baack, 16 Fed. Cas. 671 (no. 9052) (C.C.S.D.N.Y.) for the proposition that a national bank is established, and thus may be sued, only at the location recited in its charter.

Baack, however, does not support that decision because it was decided prior to the 1927 and 1933 amendments permitting national banks to conduct business at more than one location. Those amendments,

> "considered together with the legislative history and changed factual basis, indicates strongly that, as a national banks general business could now be conducted in more than one location, Congress intended that a national bank could be 'established' in places other than its charter location." Note, An Assault On The Venue Sanctuary Of National Banks, 34 Geo. Wash. L.Rev. 765, 770 (1966).

Mercantile National Bank v. Langdeau, 371 U.S. 555 (1963), although apparently holding for the proposition that national banks may be sued only in the county in which the bank is located (i.e. established), is not a reliable authority because the Court did not attempt to reexamine the definition of "location" of a national bank, and those cases cited by the Court to support its decision were not authoritative because they were either decided prior to the amendments, or are not in point. Decisions relying on Mercantile National Bank, such as Staley v. Homeland, Inc., 368 F.Supp. 1344, (E.D. N.C. 1974), are similarly flawed for their mechanical application of the special venue statute.

The oppressive interpretation that this section is subject to is based upon outmoded thinking which has not escaped attention. The American Law Institute has stated that

> "There is no obvious reason why a national bank requires a unique and restrictive venue rule, and cannot be treated as is any other corporation for purposes of venue",

and has therefore recommended, by unanimous votes of its Council, that the special venue provisions for national banks be repealed, and that they be treated for purposes of venue as any other corporation. American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts, 77, 413 (1969).

In the words of Grant Gilmore, in commenting on statutory obsolescence in the area of commercial law,

> "a 1850 codification . . . would have been a disaster in fact because few of the propositions which had seemed true in 1850 . . . had survived until 1900 in anything like recognizable form." Gilmore, On Statutory Obsolescence, 39 Colo. L. Rec. 461, 464 (1967).

In other words, Cessant ratione legis,

cessat et ipsa lex (when the reason for the law ceases, the rule itself ceases).

D. THIS PETITION FOR A WRIT OF CERTIORARI MUST BE HEARD.

By denying Plaintiff's motion raising the question of venue, the decision below falls into a class composed of "ancillary order which determine substantial rights of the parties which, if not promptly reviewed, will subject the party to irreparable harm". United States v. McWhirter, 376 F.2d 102, 105 (5th Cir. 1967). In its numerous decisions in this area, this Court has noted the considerations involved in determining whether an order is final, and thus reviewable on appeal. The decision in Brown Shoe Co. v. United States, 370 U.S. 294, 306 (1962) acknowledges that

> "The Court has adopted essentially practical tests for identifying those judgments which are, and those which are not, to be considered 'final'. (Citations) . . . A pragmatic approach to the question of finality has been considered essential to the achievement of the 'just, speedy, and inexpensive determination of every action': the touchstones of federal procedure."

Dickinson v. Petroleum Conversion Corp., 378 U.S. 507, 511 (1950) pointed out that in deciding the question of finality the most important competing considerations are "the inconvenience and costs of piecemeal review

on the one hand and the danger of denying justice by delay on the other." As has been stated, if these dictates of the Supreme Court are to rule the instant case this Petition for Writ of Certiorari must be heard by this Court before Petitioners lose finally and irreparably the right to have the venue question litigated at the only time it has any legal significance to any of the parties. If this Petition will not lie, Wellham and Channing-Hamilton Corporation will undoubtedly be compelled to prosecute their cause of action against ten defendants in three different United States District Courts, all of said prosecution occurring before Plaintiff's rights to challenge the validity of any venue transfer order accrues to them.

CONCLUSION

The issues involved are of considerable national importance. Whether the special venue provision of the Clayton Act supersedes the venue provision of the National Banking Act is a question of first impression.

For the foregoing reasons, the petition for certiorari should be granted.

Dated: August 30, 1977

Respectfully submitted,

EVANS, MAHAN & WALLERSTEIN

By: GUY C. EVANS

Attorneys for Petitioners

APPENDIX

[Pages 1a-1c]

APPENDIX

ORDER OF THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT
(caption and formal parts omitted)

ORDER

Before: Wright and Wallace, Circuit Judges

Upon due consideration, the petition for rehearing is denied.

Filed June 3, 1977

/s/ Eugene A. Wright
/s/ J. Clifford Wallace
U.S. CIRCUIT JUDGES

ORDER OF THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT
(caption and formal parts omitted)

ORDER

Before: Wright and Wallace, Circuit Judges

The motion to dismiss is granted, and the appeal is hereby dismissed. The order which transferred the action to the Northern District of Georgia is not appealable under 28 U.S.C. §1291, even under the "collateral order" doctrine of Cohen v. Beneficial Industries Loan Corp., 337 U.S. 541 (1949). See also Pacific Car and Foundry Co. v. Pence, 403 F.2d 949 (9th Cir. 1968).

Filed May 3, 1977 /s/ Eugene A. Wright
/s/ Clifford Wallace
U.S. CIRCUIT JUDGES

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

(caption and formal parts omitted)

ORDER OF TRANSFER OF ACTION AS TO DEFENDANT THE CITIZENS AND SOUTHERN NATIONAL BANK

This case having come on for hearing before this Court on June 28, 1976, pursuant to the motion of defendant The Citizens and Southern National Bank pursuant to 12 U.S.C. §94 for an order of dismissal for improper venue, or, in the alternative for an order transferring this case as to defendant The Citizens and Southern National Bank to the United States District Court for the Southern District of Georgia, defendant The Citizens and Southern National Bank having appeared by its counsel, Latham & Watkins, by Robert A. Long, and plaintiffs having appeared by their counsel, Evans, Tull & Mahan, by Guy C. Evans, and good cause appearing:

IT IS HEREBY ORDERED that the motion of defendant The Citizens and Southern National Bank is granted and that this action, insofar as it pertains to the Citizens and Southern National Bank be and hereby is transferred to the United States District Court for the Southern District of Georgia;

IT IS FURTHER ORDERED that the Clerk of the Court transmit those portions of the file in this case that pertain to the Citizens and Southern National Bank to the United States District Court for the Southern District of Georgia.

Dated: July 14, 1976.

/s/ Warren J. Ferguson
United States District Judge

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Respondents.

(CITIZENS AND SOUTHERN NATIONAL BANK, Real Party in Interest)

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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(CITIZENS AND SOUTHERN NATIONAL BANK, Real Party in Interest)

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The unreported opinion of the United States District Court for the Central District of California, which transferred Peti

tioners' action against Respondent to the United States District Court for the Southern District of Georgia, is duplicated in the Appendix to the Petition. The unreported opinions of the United States Court of Appeals for the Ninth Circuit dismissing Petitioners' appeal and denying Petitioners' petition for rehearing are also duplicated in the Appendix to the Petition. The unreported order of the United States Court of Appeals for the Ninth Circuit denying Petitioners' petition for writ of mandamus, which order was not duplicated in the Appendix to the Petition, is duplicated in the Appendix to this Brief.

JURISDICTION

The requisites for invoking the Court's jurisdiction are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. **Whether a District Court's Order Transferring an Action to Another District Court for Lack of Proper Venue Is a Final, Appealable Order.**

2. **Whether Venue in an Antitrust Suit Brought Against a National Banking Association Is Governed by the Venue Provision of the National Bank Act, 12 U.S.C. § 94, Rather Than by the Venue Provision of the Clayton Act, 15 U.S.C. § 22.**

STATUTES INVOLVED

28 U.S.C. § 1291: Final Decisions of District Courts

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of

> the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

12 U.S.C. § 94: Venue of Actions

> Suits, actions and proceedings against any association under this title [National Banks] may be had in any district, or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases.

15 U.S.C. § 15: Suits by Persons Injured; Recovery of Treble Damages

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 22: District in which to Sue Corporation

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found.

STATEMENT OF THE CASE

Petitioners' Statement of the Case is accurate.

ARGUMENT

I. The Decision of the Ninth Circuit Below Is Correct and Consistent With That of All Other Circuit Courts of Appeals Which Have Held That an Order of Transfer for Improper Venue Is Not an Appealable Order.

The District Court transferred this action under 28 U.S.C. § 1406(a), which provides that a District Court may dismiss or "if it be in the interest of justice, transfer . . . [a case in which venue is laid in the wrong district or division] to any district or division in which it could have been brought." Professor Moore has observed that an order under this Section or under 28 U.S.C. § 1404(a) (which authorizes transfer for the convenience of the parties and witnesses) "is an interlocutory order and is non-appealable except by certification under 28 U.S.C. § 1292(b)." 9 *Moore's Federal Practice*, 173-74, ¶ 110.13[6], (2d Ed. 1975) (footnote omitted). Numerous cases footnoted by Professor Moore reveal the consistency with which the Circuit Courts of Appeals have followed the rule stated by Professor Moore. *Id.* at footnote 3.

Only one case has been found in which appellate review under 28 U.S.C. § 1291 was permitted for the denial or issuance of a transfer order. That case was *United States v. Berkowitz*, 328 F.2d 358, 360 (3d Cir.), *cert. denied*, 379 U.S. 821 (1964). As both the Eighth Circuit and Professor Moore have explained, *Berkowitz* was and should remain unique. Appeal was allowed in the case only because the denial of the transfer order effectively terminated the lawsuit. The defendant was immune from service in the district court where the suit was instituted and could assert the statute of limitations as an insurmountable defense to any new suit in another district. For the distinction, see *Fischer v. First National Bank*, 466 F.2d 511 (8th Cir. 1972); 9 *Moore's Federal Practice* 174, ¶ 110.13[6] n.5 (2d Ed. 1975). In no way are the *Berkowitz* facts replicated in the instant suit.

Having failed in the first instance to seek certification of an appeal under 28 U.S.C. ¶ 1292(b), and having had their petition for writ of mandamus denied and their subsequent appeal dismissed by the Ninth Circuit, Petitioners seek to avail themselves of the exception first recognized by this Court in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). As Professor Moore has observed, however, "[t]he courts of appeals have thus far resisted attempts to import the *Cohen* rule into the area of review of transfer orders, and it is to be hoped that they will continue to do so." 9 *Moore's Federal Practice*, 174, ¶ 110.13[6] (2d Ed. 1975).

> "It is perfectly true that in the nature of things the right of appeal from transfer orders is often illusory if appeal must await final judgment. Far more illusory, however, is the notion that permitting an immediate appeal as a right from such orders will serve the interests of any except those for whom delay is victory. The vast majority of appeals would be foredoomed to failure. More than two decades of review by mandamus have produced only a relative handful of reversals, and reversals for incorrect evaluation of proper factors (abuse of discretion) is very rare. Troublesome questions of the interpretation of the transfer statutes have been largely resolved. Those yet to be encountered can be resolved by recourse to 28 USC § 1292(b). Mandamus can reach 'those cases . . . where a district judge has denied a transfer motion without even considering the merits or has granted one in such flagrant defiance of accepted principles as to evidence impermissible motivation'." *Id.* at 174-75.

Notwithstanding Petitioners' failure to seek certification of an appeal under 28 U.S.C. § 1292(b) and the Ninth Circuit's denial of the writ of mandamus sought by Petitioners, this case presents no circumstances justifying application of the *Cohen* rule. Petitioners seek to raise the spectre of being com-

pelled to prosecute their claims in three different district courts, the unstated inference being that Section 12 of the Clayton Act (15 U.S.C. § 22) confers upon Petitioners the right to maintain all of their antitrust claims against the various Respondents in a single district court. Section 12 of the Clayton Act, however, confers no such right. Quite the contrary, Section 12 of the Clayton Act enables Petitioners to bring their antitrust action against Respondent only in the judicial district in which the Respondent "is an inhabitant", where Respondent "may be found", or where Respondent "transacts business". Expansive as they are, these venue parameters of the Clayton Act do not guarantee Petitioners a trial of their action in a single forum.

In actuality, Petitioners never carried their burden of establishing with respect to Respondent the existence of proper venue under Section 12 of the Clayton Act in the Central District of California. Although Respondent premised its original motion to dismiss or transfer Petitioners' action for lack of proper venue upon the venue provision of the National Bank Act, 12 U.S.C. § 94, in the face of Respondent's motion the Petitioners never established any factual basis for venue under Section 12 of the Clayton Act. Indeed, Respondent was not chartered in the Central District of California, and was not at the time the Petitioners filed their complaint or since then operating any branches in the Central District of California or transacting any business in the Central District of California. Respondent's responsive pleadings, filed in the Southern District of Georgia following transfer of the action, denied all of the Petitioners' jurisdictional and venue allegations respecting Respondent. Furthermore, even the record of service respecting the service of the Petitioners' Complaint upon the Respondent discloses that, in the absence of any officer or agent in California, service of the Complaint was made upon an officer of Respondent at its main office in Atlanta, Georgia. These factors, coupled with the inherent multi-district nature of many anti-

trust actions, belie the existence of any compelling reason for the application of the *Cohen* exception to the general non-appealability of transfer orders.

II. Venue in the Petitioners' Action Against the Respondent Is Governed by the Venue Provisions of the National Bank Act, 12 U.S.C. § 94.

Petitioners insist that the general venue provision in Section 12 of the Clayton Act, 15 U.S.C. § 22, takes precedence over the more specific and earlier-enacted venue provisions of 12 U.S.C. § 94 when national banking associations such as the Respondent are named as defendants in antitrust actions. Admittedly, the issue for which review is sought is a narrow and somewhat novel one. It does not, however, warrant review by the Court. There is no conflict of decisions among the circuit courts of appeals. Indeed, though the Petitioners urge that the issue is one of national importance, the Petitioners conceded in the District Court that, despite the passage of some sixty-four years since the enactment of Section 12 of the Clayton Act, the Petitioners have "been unable to find any case in any Court which concerns itself with this question." Notwithstanding the lack of precedent on this issue or the apparent infrequency with which it arises, the Petition should be denied simply because the arguments raised by the Petitioners were answered by the Court in *Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976).

In the District Court the Petitioners relied principally on the Third Circuit Court of Appeals decision in *Ronson Corp. v. Liquifin Aktiengesellschaft*, 483 F.2d 852 (3d Cir. 1973). Petitioners used *Ronson* to support their argument that the venue provisions of the Clayton Act relied upon by Petitioners are analogous to the venue provisions of the Securities Exchange Act applied in *Ronson*, since both are broad, expansive, and

substantially similar in content and both were enacted subsequent to the National Bank Act. In responding to these arguments before the District Court, Respondent relied upon the then newly-issued decision of this Court in *Radzanower*.

In *Radzanower*, this Court held that "[t]he narrowly drawn, specific venue provision of the National Bank Act must prevail over the broader, more generally applicable venue provision of the Securities Exchange Act." 426 U.S. 148, 158 (1976). In *Radzanower*, the Court noted that the National Bank Act was designed to meet particularized problems of national banks, while the later-enacted Securities Exchange Act, with its broader venue provision, was designed to deal with a much larger universe of potential defendants. Applying the "basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum" and finding no "clear [congressional intention otherwise", the Court concluded that the specific venue provision of 12 U.S.C. § 94 takes precedence over a more general venue statute. Id. at 153-54.

As the Petitioners so aptly pointed out in their opposition brief in the District Court, the interaction of the general venue provision of the Clayton Act with the special venue provision of the National Bank Act in this case should be analyzed in the same way that the interface between the venue provisions of the Securities Exchange Act and the National Bank Act has been analyzed in other cases. Though the Petitioners have abandoned their analogy to the Securities Exchange Act since the *Radzanower* decision, the Court's reasoning in *Radzanower* applies with equal force to the venue provision of the Clayton Act.

Both Section 12 of the Clayton Act and Section 27 of the Securities Exchange Act are broad federal venue statutes using similar language and dealing with federal regulatory laws which cover a wide universe of potential defendants. Both were enacted long after the National Bank Act. As with Section 27 of the Securities Exchange Act, it is clear that Section 12 of the Clayton Act was not intended expressly to repeal the earlier bank venue statute. It is also obvious that since the vast majority of antitrust actions do not involve national banking corporations, no implicit repeal of 12 U.S.C. § 94 is necessary to make the antitrust laws "work". *Cf. Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155-57 (1976).

Petitioners have listed a number of policy reasons why they believe Section 12 of the Clayton Act should control in this case. In addressing virtually the same policy arguments presented in *Radzanower*, the Court stated that "policy arguments such as these are more appropriately addressed to Congress than to this Court." *Id.* at 156, n.12.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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ALSTON, MILLER & GAINES
Counsel for Respondent

APPENDIX

United States Court of Appeals
for the Ninth Circuit

James W. Wellham, an Individual, Channing-Hamilton Corp., a Corporation, Petitioners, vs. U.S. District Court for the Central District of California, Respondent, Union Bank, a Banking Corp., Citizens and Southern National Bank, a Banking Corporation, Real Parties in Interest.	No. 76-2557

ORDER

(Filed August 9, 1976)

Before: CHOY and SNEED, Circuits Judges.

Upon due consideration, the petition for writ of mandamus filed July 19, 1976 is denied; the motion to stay the transfer is denied as moot.

HUBERT Y. CHOY
JOSEPH T. SNEED
United States Circuit Judges

Mo Cal 7/26/76